APPENDIX

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[SEAL]

COURT OF APPEALS
EIGHTH DISTRICT OF TEXAS
EL PASO, TEXAS

No. 08-94-00297-CR

MICHAEL SCOTT THOMAS,
Appellant,

v.

THE STATE OF TEXAS,
Appellee.

Appeal from the 238th Judicial District Court
of Midland County, Texas
(TC# CRB-20, 851)

OPINION

This is an appeal from a conviction for the offense of aggravated robbery. Upon a finding of guilty, the jury assessed the punishment at nine years' confinement in the Texas Department of Criminal Justice. In a single point of error, Appellant asserts that the trial court erred by refusing to grant his motion for instructed verdict made after the State's case-in-chief. We affirm the judgment of the trial court.

I. SUMMARY OF THE EVIDENCE

On April 14, 1993 at approximately 7:15 p.m., Appellant helped Ramsey Harrell, his friend and co-defendant, run away from home. On their way to the Appellant's house they decided that the Appellant should call a neighborhood friend, Mr. Jerry Hon, and ask him for a ride

home from a local KOA Kampground (KOA). Hon was feeling sick so Hon's housemate, Mr. Tommy Musick (Musick), offered to pick them up. Musick picked the co-defendants up in his silver and black Chysler LeBaron and took them to Appellant's house. There, while still in the car, Harrell shot Musick four times in the back of the head.

Appellant claims that Harrell then drove to an old deserted road and dumped the body. The co-defendants then left the car near the local airport. Harrell took Musick's money bag and put it down his shirt and the two proceeded to walk to Harrell's house.

At approximately 9:00 p.m., the co-defendants arrived at the Harrell residence. According to Appellant, after Harell showered, he emptied the black bag of its contents, which included a wallet and credit cards. Harrell put Musick's black money bag, the bloody clothes, the gun, and bullets in a grey duffle bag. The co-defendants went on an errand for Harrell's mother and then went to Musick/Hon residence. Appellant told Hon that Musick never picked them up. Harrell then drove to a dirt road behind Water Wonderland and threw the duffle bag into a field.

At approximately 3:00 a.m., the police arrived at the Harrell residence and found a pair of bloody jeans in Harrell's room. Harrell admitted to the police that he was the gunman. Appellant, in a statement given to the police that morning, stated that Musick grabbed Appellant's crotch and Harrell, frightened, shot Musick.

Approximately a week after being arrested, Appellant gave another subsequent statement—what Appellant himself described as being "the truth." Appellant led the police to a point behind a local amusement park. There they found a duffle bag with bloody jeans, Musick's belongings, and the black bag that usually contained Musick's money and credit cards.

Appellant maintains that Harrell told him to tell the police that when Musick tried to make sexual advances toward him, Harrell got scared and shot him. Appellant testified that he made his initial statement because he was afraid of Harrell, he was ashamed that he did not help Musick, and he did not want to go to prison. In contrast to Appellant's testimony, Harrell's testimony at his own trial indicated that Appellant did everything that the Appellant claimed Harrell did after the shooting.[1]

Appellant was charged as a party to the aggrieved robbery of Musick. The application paragraph of the charge to the jury provided in relevant part:

> YOU FURTHER BELIEVE BEYOND A REASONABLE DOUBT that the defendant, MICHAEL SCOTT THOMAS, acting with the intent to promote or assist the commission of the said offense of AGGRAVATED ROBBERY by the said RAMSEY BLAKE HARRELL, did then and there solicit, direct, aid, or attempted to aid the said RAMSEY BLAKE HARRELL to commit the said offense of AGGRAVATED ROBBERY, then you will find the defendant, MICHAEL SCOTT THOMAS, guilty of the offense of AGGRAVATED ROBBERY as alleged in COUNT II of the indictment and so say by your verdict.

Appellant asserts that there was no evidence that Appellant was a party to the offense of aggravated robbery and therefore the trial court erred in refusing to grant a motion for an instructed verdict.

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[1] Harrell refused to testify and was held in contempt of court. Defense counsel did not object to this evidence. While this may be hearsay, hearsay that is not objected to is not to be denied probative value merely because it is hearsay. TEX.R.CRIM.EVID. 802 (Vernon 1994); *See also Mares v. State*, 758 S.W.2d 932 (Tex.App.—El Paso 1988, pet. ref'd).

II. DISCUSSION

A challenge to the trial court's ruling on a motion for an instructed verdict is in actuality a challenge to the sufficiency of the evidence to support the judgment of conviction. *Nevarez v. State*, 847 S.W.2d 637 (Tex.App.—El Paso 1993, pet. ref'd); *Madden v. State*, 799 S.W.2d 683 (Tex.Crim.App. 1990) (disavowing waiver language found in *Hafdahl v. State*, 805 S.W.2d 396 (Tex.Crim. App. 1990).

In reviewing the sufficiency of the evidence to support a criminal conviction, we are constrained to view all the evidence in a light most favorable to the verdict to determine whether any rational trier of fact could find the essential elements of the crime as alleged beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2788-89, 61 L.Ed.2d 560 (1979); *Geesa v. State*, 820 S.W.2d 154, 159 (Tex.Crim.App. 1991); *Dwyer v. State*, 836 S.W.2d 700 (Tex.App—El Paso 1992, no pet.); *Enriquez v. State*, 826 S.W.2d 191 (Tex. App.—El Paso 1992, no pet). Our role is not to ascertain whether the evidence establishes guilt beyond a reasonable doubt. *Stoker v. State*, 788 S.W.2d 1, 6 (Tex. Crim.App. 1989), cert. denied, 498 U.S. 951, 111 S.Ct. 371, 112 L.Ed.2d 333 (1990). Nor do we resolve any conflict of fact or assign credibility to the witnesses as it was the function of the trier of fact to accept or reject any, part, or all of any witness's testimony. *See Adelman v. State*, 828 S.W.2d 418, 421 (Tex.Crim.App. 1992); *Matson v. State*, S.W.2d 839, 843 (Tex.Crim.App. 1991). Instead, an appellate court's duty is only to determine if both the explicit and implicit findings of the trier of fact are rational by viewing all the evidence admitted at trial in a light most favorable to the verdict. *Adelman*, 828 S.W.2d at 421-22. In so doing, any inconsistencies in the evidence are resolved in favor of the verdict. *Matson*, 819 S.W.2d at 843, quoting *Moreno v. State*, 755 S.W.2d 866, 867 (Tex.Crim.App. 1988). The standard of re-

view is the same for both direct evidence and circumstantial evidence cases. *Geesa*, 820 S.W.2d at 158.

Since there is insufficient evidence to convict Appellant as a primary actor for aggravated robbery, a law of parties theory must be used. A person is criminally responsible for an offense committed by another under a theory of parties if the person acts with the intent to promote or assist the commission of the offense, he solicits, encourages, directs, aids, or attempts to aid the other person to commit the offense. TEX. PENAL CODE ANN. § 7.02(a)(2) (Vernon 1974). Where the evidence shows a defendant was not the primary actor but at most, responsible for the actions of the primary actor, the State must prove or the record must show conduct constituting the offense plus an act or acts by the defendant done with intent to promote or assist such conduct. *Beier v. State*, 687 S.W.2d 2, 3 (Tex.Crim.App. 1985).

As noted above, Appellant was convicted as a party to aggravated robbery. Aggravated robbery is defined as when a person commits robbery and he causes serious bodily injury to another or exhibits a deadly weapon.[2] TEX. PENAL CODE ANN. § 29.03 (Vernon 1994). Viewed in a light most favorable to the verdict, we find sufficient evidence which would implicate Harrell and Appellant on aggravated robbery charges. First, prior to the murder, Harrell had mentioned to the Appellant that he had a gun. Second, Musick always kept money in his black bag. Appellant knew Musick carried money and had seen Musick with what looked like a lot of money on a prior occasion. Police found blood and some change laying outside Musick's car when it was found near the airport after the murder. There was no money inside

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[2] A person commits robbery if, in the course of committing theft and with intent to maintain control of the property he intentionally, knowingly, or recklessly causes bodily injury to another or places another in fear of such an injury. *See* TEX.PENAL CODE ANN. § 29.02 (Vernon 1994).

Musick's black bag when the Appellant led police to it. Viewed in a light most favorable to the verdict, a rational jury could infer there was money in the bag and that, with Appellant's help, Harrell stole the money in it.

Every fact need not point directly to Appellant's guilt; rather, it is sufficient if the finding of guilt "is warranted by the combined and cumulative force of all the incriminating circumstances." *Gribble v. State,* 808 S.W.2d 65, 74 (Tex.Crim.App. 1990), cert. denied, —— U.S. ——, 111 S.Ct. 2856, 115 L.Ed.2d 1023 (1991). This necessary scheme of facts may be found from events which occurred before, during, or after commission of the offense. *Burdine v. State,* 719 S.W.2d 309, 315 (Tex. Crim.App. 1986). In the instant case, the evidence shows that Appellant made the phone call to Musick to ask him to pick up the co-defendants. Eyewitness testimony on the day of the murder and robbery stated that Appellant and Harrell would go into the Appellant's house, would come back out, and then would "do something" in the back of the car. This could lead to an inference of the Appellant's involvement in the offense. Appellant assisted Harrell in the concealment of the offense by telling Hon that Musick had never picked them up.

Appellant admitted being present at the occurrence of the offense and other testimony corroborates this fact. While the presence of the accused at the scene of an offense is not alone sufficient to support a conviction, it is a circumstance tending to prove guilt, which, combined with other facts, may suffice to show that the accused was a participant. *Beardsley v. State,* 738 S.W.2d at 685.

The Appellant admitted that he fled with Harrell in Musick's car. Flight from the scene is a circumstance that may be considered by the jury as an inference of guilt. *Harris v. State,* 645 S.W.2d 447 (Tex.Crim.App. 1983). According to the Appellant, Harrell would not allow him to leave. Appellant claimed that he was frightened by Harrell, yet declined to go to New Mexico when Harrell

wanted to go there to hide out. Appellant's own testimony indicated that Harrell did not threaten him.

Contradictory or false statements can constitute inculpatory evidence that a person was a party to the offense. *Miranda v. State*, 813 S.W.2d 724, 733 (Tex.App.—El Paso 1991, pet. ref'd). After the offense, Appellant made contradictory or false statements concerning his involvement in the offense. He claimed that Musick grabbed his crotch and then later retracted this statement. With such evidence, a rational jury could infer the Appellant's intent and understanding of the common design to commit the offense.

Jurors are the triers of the facts, the judges of the credibility of the witnesses and the weight to be given to their testimony. TEX.CODECRIM.PROC.ANN. art. 38.04 (Vernon 1979). Reconciliation of evidentiary conflicts is solely a function of the trier of fact. In the instant case, much of the Appellant's testimony conflicts with the testimony of other witnesses or with the Appellant's first statement to the police. Carol Harper, manager of KOA Kampground asked the co-defendant who was coming for them before Musick had picked them up. Appellant told her that he called his dad and that his dad was going to pick them up. However, Appellant's father testified that he was not in town on the evening of April 14 and he did not have a phone. Appellant claims that Carol Harper misunderstood him. The jury is entitled to accept or reject all or any part of the testimony by the witnesses for the State and the accused. See *Beardsley*, 738 S.W.2d at 684. Appellant tried to implicate Harrell by testifying that on the night Appellant introduced Musick to Harrell, Musick and Hon got into an argument in which Musick's black bag was knocked down. According to Appellant, both Harrell and himself saw all the contents—credit cards, money, and "slips of paper"—spill out. However, Hon testified that incident never occurred and claimed that on that day there was never any talk about money or credit

cards. The conflicting testimony presented a fact issue for the jury which it resolved by its verdict.

From the combined and cumulative force of all the incriminating circumstances, we find that the jury was entitled to conclude that Appellant knew that Harrell possessed a gun, assisted him in luring Musick to the scene of the robbery, assisted in taking money from Musick's bag, and then proceeded to help Harrell conceal evidence. *See generally, Gribble*, 808 S.W.2d at 74. Thus, contrary to Appellant's argument that the evidence showed he was merely a bystander lacking any culpability, it was rational for the jury to conclude he was directly involved in the offense. *See Harman v. State*, 788 S.W.2d 193 (Tex.App. —Houston [1st Dist.] 1990, no pet.) (evidence supported conclusion that defendant had participated in aggravated robbery, despite claim that he brought accomplices to scene without advance knowledge of their criminal intent and was forced to remain during robbery by their threats; acomplices could not have concealed weapons prior to incident and victims testified that no threats were made against defendant in their presence). Accordingly, Appellant's sole point of error is overruled.

Having overruled Appellant's sole point of error, judgment of the trial court is affirmed.

July 20, 1995

/s/ Richard Barajas
RICHARD BARAJAS
Chief Justice

Before Panel No. 2
Barajas, C.J., McClure and Chew, JJ.

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THE STATE OF TEXAS,
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JUDGMENT

The court has considered this cause on the record and concludes there was no error in the judgment. We therefore affirm the judgment of the court below. We further order Appellant to pay all costs of this appeal, in accordance with the opinion of this Court, and that this decision be certified below for observance.

IT IS SO ORDERED THIS 20TH DAY OF JULY, 1995.

/s/ Richard Barajas
RICHARD BARAJAS
Chief Justice

Before Panel No. 2
Barajas, C.J., McClure and Chew, JJ.

OFFICIAL NOTICE
COURT OF CRIMINAL APPEALS

November 15, 1995
COA # :08-94-00297-CR

Re: Case No. 1063-95

STYLE: THOMAS, MICHAEL SCOTT v. STATE OF TEXAS

ORDER

THE APPELLANT'S PETITION FOR DISCRETIONARY REVIEW IS REFUSED.

(FINAL RULING)

TROY C. BENNETT, JR.
Clerk